# NO. 44515-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**KENNETH CHENEY,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

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# BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. Defense counsel failed to provide Mr. Cheney with constitutionally guaranteed counsel by failing to object to the prosecutor's misstatements in closing argument shifting the burden of proof exclusively to Mr. Cheney.

2. Mr. Cheney was denied his Sixth and Fourteenth Amendment right to effective assistance of counsel.

3. As Mr. Cheney was denied effective counsel, the trial court erred in entering a judgment against Mr. Cheney for possession of methamphetamine.

## B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to both the prosecutor's failure to acknowledge its obligation to prove possession beyond a reasonable doubt and the prosecutor's argument that the only burden of proof was Mr. Cheney's burden to prove unwitting possession. Was Mr. Cheney denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## C. STATEMENT OF THE CASE

### 1. Procedural History

The state charged Mr. Cheney with a single count of possession of methamphetamine. CP 1-2. The case proceeded to trial before a jury. RP 1A at 63-158 and RP 1B at 159-305. Mr. Cheney argued that any possession was unwitting. RP 1B at 251-68. The jury found him guilty and the court sentenced him. CP 3, 4-15; RP 1B at 306-313. Mr. Cheney now appeals. CP 16.

### 2. Trial Record

(a) The Traffic Stop

Kenneth Cheney and Robert Downing both have sons who play football. On October 18, 2012, the two men were in Cathlamet for a game. After the game, Mr. Cheney was driving home to Mossy Rock on an unfamiliar road in Longview. Mr. Downing was his passenger. RP 1B at 160-61, 179.

Mr. Cheney got turned around near an intersection and ended up going the wrong way in traffic. RP 1A at 70-76; RP 1B at 180. Cowlitz County Sheriff's Deputy Mark Johnson saw the bad driving and signaled Mr. Cheney to pull over. RP 1A at 70-76. Mr. Cheney did so without incident. RP 1A at 77, 80.

It was after dark. RP 1A at 75, 89. Deputy Johnson contacted Mr. Cheney who was in the driver's seat. Id. at 80. As a general safety precaution, Deputy Johnson wanted to see everything going on inside the car so he illuminated the interior with his flashlight. Id at 89. He asked Mr. Cheney for his driver's license, registration, and insurance. Mr. Cheney readily provided his license. He told the deputy he did not have insurance. Id. at 82-83.

To get the car's registration, Mr. Cheney reached up and flipped down the driver's side visor. Aided by the illumination, he found the registration immediately and handed it to the deputy. RP 1A at 94. Mr. Cheney was the registered owner of the car. Id. at 101.

The illumination also made it easy for Deputy Johnson to see a narrow red glass pipe with a flared end secured on the visor by the visor's elastic band. Deputy Johnson could see some residue in the pipe's bowl. He suspected it was methamphetamine. Id. at 83-93. Per Deputy Johnson, he asked Mr. Cheney about the pipe and Mr. Cheney said "what pipe" while taking items out of the visor and shielding the pipe from view with his hands. Id. at 94-95.

Deputy Johnson asked Mr. Cheney to hand him the pipe and Mr. Cheney did so. RP 1A at 97. Deputy Johnson went back to his patrol car.

After checking Mr. Cheney's driving status,[1] Deputy Johnson arrested Mr. Cheney for possession of methamphetamine. RP 1A at 100-02.

Deputy Johnson took Mr. Cheney back to his patrol car and advised him of his rights.[2] RP 1A at 104. Mr. Cheney denied that the pipe was his and knowing the pipe was in the car.[3] He did tell Deputy Johnson he loaned his car out to others including his roommate and had done so recently. Mr. Cheney did not volunteer his roommate's name and Deputy Johnson did not ask for his name. Id. at 110-12. It was not Mr. Cheney's place to say whether this roommate was a drug user. Id. at 115. Per Deputy Johnson, Mr. Cheney did recognize the pipe as a meth pipe. Id. at 140. After Deputy Johnson told Mr. Cheney he was responsible for what was in his car, Mr. Cheney agreed that he would take responsibility for the pipe. RP 1A at 106, 139; RP 1B at 192, 206.

Mr. Cheney stipulated that the residue in the pipe contained methamphetamine. RP 1A at 158.

(b) Unwitting Possession

Mr. Downing testified as a defense witness. He said Mr. Cheney expressed surprise when Deputy Johnson asked about the pipe. RP 1A at

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[1] Mr. Cheney's license was suspended in the third degree. This information did not come into evidence at trial. Rather, it was discussed during a pre-trial motion in limine. RP 1A at 8-9.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1062, 16 L.Ed.2d 694 (1966).

[3] A CrR 3.5 hearing was heard before trial testimony began. RP 1A at 12-43. The court held that Mr. Cheney's statements to Deputy Johnson were admissible.

163. Mr. Cheney did nothing to try to hide the pipe from the deputy. Id. at 164. Mr. Cheney denied ownership of the pipe. He knew Mr. Cheney loaned his car to other people. Id. at 166-67.Deputy Johnson was pretty adamant that Mr. Cheney was responsible for everything in his car. Id. at 165.

Mr. Cheney testified. He kept things like his son's football schedule and his daughter's volleyball schedule in his car's visor. As such, he does occasionally look at the visor and its contents. RP 1B at 183. He lets one of his roommates borrow his car a couple of times a week. Id. at 184. He does not search the car after others use it. Id. He was shocked by the presence of the pipe in his car, he told Deputy Johnson it was not his pipe, and he never suggested to Deputy Johnson that it was a meth pipe. Id. at 188, 193-94. In fact, he had no idea what the pipe was used for. Id. at 206. He was unaware at the time that his roommate was a drug user although he realized in hindsight that the roommate, Kenny Thompson, was "kind of shady." Id. at 198-200.

(c) Court's Instructions on Burden of Proof

The court instructed the jury with the following information about burdens of proof in the case.

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a

> reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.[4]

Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (sub. nom. 17), Instruction 3.

Mr. Cheney's defense was unwitting possession of the pipe and its contents. As such, the court instructed the jury on unwitting possession.[5]

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.[6]

Supp. DCP, Court's Instructions to the Jury, Instruction 8.

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[4] 11 WAPRAC WPIC 4.01

[5] The state included the unwitting possession instruction in its proposed instructions. Supp. DCP, State's Proposed Jury Instructions (sub. nom. 13). Mr. Cheney did not file any proposed instructions.

[6] 11 WAPRAC WPIC 52.01

## D. ARGUMENT

### DEFENSE COUNSEL FAILED MR. CHENEY DURING CLOSING ARGUMENT BY NOT OBJECTING TO THE PROSECUTOR SHIFTING THE BURDEN OF PROOF TO MR. CHENEY.

Defense counsel should have, but did not, object to the prosecutor's statement shifting the burden of proof exclusively to Mr. Cheney. This failure fell below that of a reasonable attorney and in a reasonable likelihood effected the jury's decision. Mr. Cheney's conviction should be reversed.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const, Amend XIV; *Gideon v. Wainwright*, 373 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution. *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice – "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A defendant alleging ineffective assistance must overcome "'a strong presumption that counsel's performance was reasonable.'" *State v. Grier,* 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)), *adhered to in part on remand*, 168 Wn. App. 635 (2012))). The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence … of prior convictions has no support in the record.")

An ineffective assistance claim presents a mixed question of law and fact requiring de novo review. *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010).

In closing argument, the prosecutor summarized the case from the state's perspective. RP 1B at 244-251. In concluding, he acknowledged that the state has any burden of proof only in passing, "I leave you off with the burden for the State has been met." Id. at 251. The prosecutor then told the jury:

> Now it is their turn to show that they should not be held responsible, and this is where this case is unique for this one purpose. The burden shifts. And up to this point, I would surmise that Mr. Morgan[7] will agree with everything I've said, that possession has been established. Now it is their job to prove unwitting possession. And only – only once they've proven that, can [Mr. Cheney] not be held responsible for being in possession."

RP 1B at 251.

Mr. Cheney did not object to any portion of the prosecutor's closing argument or rebuttal closing argument.

Contrary to the prosecutor's assertion though, Mr. Cheney did not concede possession. RP 1B at 258. Mr. Cheney argued at some length in closing about the state's burden beyond a reasonable doubt and the defense burden to prove unwitting possession by a preponderance of evidence. Id. at 259-62.

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[7] Mr. Morgan is defense counsel.

In rebuttal closing, the prosecutor again did not acknowledge his burden to prove the possession charge beyond a reasonable doubt. Instead, he returned to the argument about how the "law switches" meaning the state no longer has a burden to prove the charge because the "law switches" to require Mr. Cheney to disprove the charge. RP 1B at 269.

The state bears the burden of proving every element of a crime beyond a reasonable doubt. *State v. Hager*, 171 Wn.2d 151, 159 n .8, 248 P.3d 512 (2011). The state may not make remarks that conflict with the defendant's presumption of innocence, nor may it make arguments that shift the burden of proof onto the defendant. See *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Yet that is what the state did here without any objection from defense counsel.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances.

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench trial conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statements, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

*Hodge v. Hurley*, 426 P.3d 368, 386 (6th Circuit, 2005).

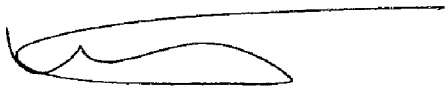
Here, defense counsel should have objected to the prosecutor's improper burden-shifting statements. By failing to object, counsel's performance fell below an objective standard of reasonableness. At a minimum, Mr. Cheney's lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. Yet, he did neither.

Furthermore, Mr. Cheney was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. *In re Glasmann*, 175 Wh.2d 696, 708, 286 P.3d 673 (2012). The failure to object deprived Mr. Cheney of his Sixth and Fourteenth Amendment right to effective assistance of counsel. Accordingly, Mr. Cheney's possession of methamphetamine conviction must be reversed and remanded. The remedy for a lawyer's ineffective assistance is a new trial. *State v. Crawford*, 159 Wn.2d 86, 107, 147 P.3d 1288 (2006).

## E. CONCLUSION

Mr. Cheney's conviction should be reversed without prejudice and remanded to the trial court for further action.

Respectfully submitted this 9th day of August 2013.



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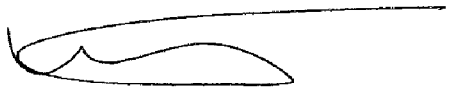
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at sasserm@co.cowlitz.wa.gov; and (2) the Court of Appeals, Division II; and (3) I mailed it to Kenneth Cheney P.O. Box 54, Mossyrock, WA 98564.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 9, 2013, in Mazama, Washington.



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